United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

B

P/S

74-1550

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1550

UNITED STATES OF AMERICA,

Appellee,

—against—

CARMINE TRAMUNTI, et al.,

PAUL J. CURRAN

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT ANGELO MAMONE'S SUPPLEMENTAL APPENDIX

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Angelo Mamone

(36)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

THE UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

- -x

NOTICE OF PRETRIAL MOTION FOR DEFENDANT-APPELLANT ANGELO MAMONE

73 Cr. 1099

Judge DUFFY

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Joseph P. Hoey, sworn to the 26th day of October, 1973, the indictment and upon all prior proceedings heretofore had herein, the undersigned will move this Court at a motion part to be held before the Honorable Kevin T. Duffy, United States District Judge, in Room 519 at 2:15 P.M. on Tuesday, November 13, 1973, at the United States Courthouse, Foley Square, New York, New York, for:

1. An order pursuant to Rule 7(c) to dismiss the first count of the indictment on the ground that such count is so vague and indefinite as to fail to adequately inform defendant Mamone of the charge against him, to enable him

to prepare his defense and to prevent Mamone against twice being placed in jeopardy for the same offense.

2. An order pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure* requiring the United States Attorney to serve and file the particulars set forth in Exhibit "A" hereto.

3. An order pursuant to Rule 16 directing discovery and inspection of the documents and materials set forth in Exhibit "B" hereto.

4. An order pursuant to Brady v. Maryland, 373 U.S. 83 (1963) directing the government to produce and deliver to Mamone all favorable and exculpatory evidence in its possession or subject to its control.

5. An order pursuant to Rule 14 severing Mamone's trial from that of the other defendants, and in connection therewith, an order directing the United States Attorney to deliver to the Court for in camera inspection any statement or confession made by the defendants which the government

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* References to the Rules herein are to the Federal Rules of Criminal Procedure.

intends to introduce into evidence at the trial.

6. An order pursuant to Rule 7(d) to strike the appellation "Butch" from the indictment as prejudicial surplusage.

7. For such other and further relief as the Court may deem just and proper.

October 29, 1973.

Yours, etc.,

AMEN, WEISMAN & BUTLER
Attorneys for Defendant
Angelo Mamone
17 East 63rd Street
New York, New York 10021
838-2323

TO: PAUL J. CURRAN
United States Attorney
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

EXHIBIT "A"

MOTION FOR A BILL OF PARTICULARS

THE FIRST COUNT OF THE INDICTMENT

1. State the date when and the place where the conspiracy referred to therein commenced.

2. State (a) the date when Mamone entered the said conspiracy; and (b) whether he continued to be a member of the conspiracy until the date of the filing of the indictment herein. If Mamone withdrew from the conspiracy prior to the filing of the indictment herein, set forth the date, place and circumstances of such withdrawal.

3. Specify the act or acts by which the government will claim that Mamone entered the conspiracy.

4. Describe each overt act committed by:

A. Mamone; and

B. Each other co-conspirator in furtherance of the conspiracy and, in so doing, set forth:

(i) the date and place of each such act;

(ii) each participant therein; and

(iii) each district other than the Southern District of New York in which the conspiracy was committed and identify each act of Mamone in each such other district.

5. Describe the capacity, role and nature of Mamone's participation in the conspiracy.

6. State the time when, the place where and the manner in which, and each person from whom, Mamone learned of the purpose of the conspiracy.

7. Identify each co-conspirator known to the grand jury but not named in the first count of the indictment and state the reason why the government failed to identify each such co-conspirator known to the grand jury.

8. Set forth the current address of each co-conspirator mentioned in the indictment or known to the government but not named.

9. State the date when, the place where and the manner in which the government will claim that defendant Mamone combined, conspired, confederated and agreed together with each other to violate Sections 4705(a) and 7237(b) of Title 26, United States Code, and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. In so doing, state whether the government will claim that Mamone conspired to violate each of the said statutes and, if not, identify each such statute the government will claim Mamone combined to violate.

10. Identify each benefit, profit or gain which the government will claim Mamone derived from the said conspiracy.

11. State whether the government will claim that there was an express agreement between Mamone and any other defendant or co-conspirator embodying the conspiracy. If the answer is affirmative, state whether the government will claim that the agreement was oral or written. If written, identify each document embodying such agreement and annex true copies thereof. If oral, state the dates, participants and substance of each such agreement.

12. State whether the government will claim that Mamone and the other defendants and co-conspirators were part of a single conspiracy; and, if not, describe each separate conspiracy alleged to exist, including the dates and purposes thereof, each participant therein, each overt act committed in furtherance thereof and the circumstances under which it will be claimed that Mamone entered each such conspiracy.

13. Identify each narcotic drug which the government will contend Mamone "unlawfully, wilfully, knowingly, intentionally would sell, barter, exchange and give away".

14. Identify by name and address each of the persons referred to in Paragraph 2 of Count One to whom the government will contend narcotic drugs were sold. In so doing, state whether Mamone:

A. sold;

B. bartered;

C. exchanged; or

D. gave away

narcotic drugs to any such person. If the answer is affirmative, identify each such transaction by date, place, participant and the narcotic drugs involved.

15. Identify each narcotic drug controlled substance referred to in Paragraph 3 of Count One of the indictment which the government will contend that Mamone conspired to distribute and possess with intent to distribute. In so doing, state:

A. the place where;

B. the time when; and

C. the person or persons to whom Mamone would distribute each such narcotic drug controlled substance.

OVERT ACTS

16. State whether the government will contend that Mamone:

A. was aware

B. was present at; or

C. knew the purpose:

(i) of the meeting in or about June, 1969 between defendants Inglese and Delvecchio at Diane's Bar;

(ii) when in June, 1969, defendant Delvecchio handed co-conspirator Cadman an aluminun foil packet containing heroin, in Diane's Bar;

(iii) of the delivery in or about November, 1969, by defendant Inglese of a clear plastic package containing heroin to Diane's Bar;

(iv) of the delivery in or about June, 1970, by defendant Loria of one-half kilogram of heroin;

(v) of the receipt in or about June, 1970, by defendant Forbrick of one-half kilogram of heroin;

(vi) when in or about May, 1971, defendants Delvecchio and Christiano went to Bloomfield, New Jersey, and cut and packaged three kilograms of heroin;

(vii) of the meeting in or about May or June, 1971, between defendants Lentini and John Doe, a/ka "Joe Red" in the vicinity of a barber shop on Pleasant Avenue, New York, New York;

(viii) of the meeting in or about July, 1971, between defendants Pugliese, Dillacio and Barnaba in the vicinity of Westchester and Buhre Avenues, Bronx, New York;

(ix) when in or about December, 1971, defendant DiNapoli delivered a package of heroin;

(x) when in or about November, 1971, defendants Dawson, a/k/a "Tennessee" and John Doe, a/k/a "Fook" traveled from Washington, D.C. to New Jersey;

(xi) when in or about November or December, 1971, defendant Springer, a/k/a "Hank" received a quantity of heroin;

(xii) when in or about January, 1972, defendant Publiese delivered approximately three kilograms of heroin;

(xiii) when in or about January, 1972, John Doe, a/k/a "Sinatra" received approximately three kilograms of heroin;

(xiv) when in or about March, 1972, defendants Green, Butch Ware, Hattie Ware and John Doe, a/k/a "Basil" received a quantity of heroin;

(xv) when in or about October, 1972, defendant Delvecchio went to Robbie's Mardi Gras in New York, New York;

(xvi) when in or about October, 1972, defendants Warren C. Robinson and Henry Salley traveled from Washington, D.C. to New Jersey;

(xvii) when in or about May or June, 1971, defendant Marchese, a/k/a "Joe Cab" received one-half kilogram of heroin from defendant Inglese at the Beach Rose Social Club, Bronx, New York;

(xviii) when in or about November, 1972, defendant Toutoian delivered a quantity of heroin;

(xix) when on or about January 10, 1973, defendant Russo received a quantity of heroin;

(xx) when in or about January, 1973, defendants Tramunti and Inglese had a conversation at LoPiccolo, Bronx, New York;

(xxi) when in or about April, 1973, defendant Mary Jane Salviani, a/k/a "Liz" received a quantity of mannita;

(xxii) when in or about May, 1973, John Doe, a/k/a "Jimmy Wyatt Earp" went to the Golden Hour, Bronx, New York;

(xxiii) when in or about May, 1973, defendant Sapada received approximately one-half kilogram of cocaine;

(xxiv) when on or about May 30, 1973, defendant Rizzo went to the Centaur Restaurant, New York, New York; and

(xxv) when on or about May 30, 1973, defendant Thomas Lentini, a/k/a "Moe" delivered a quantity of cocaine to defendant Lessa.

17. State whether Mamone participated in any of the deliveries, meetings, travels and other transactions described in subparagraphs (i) through (xxv) above. If the answer is affirmative, describe the nature of each such participation.

WITH RESPECT TO THE
INDICTMENT IN GENERAL

18. With respect to any matter concerning which the government shall state in its bill of particulars that its knowledge or information is incomplete, state the knowledge or information the government now has and furnish to defendant Mamone any further knowledge or information obtained after the government responds to this demand, within ten days after the government shall have obtained such further knowledge or information and, in any event, not later than thirty days before trial.

19. State whether there is an informer relationship between any prospective witness and the government and each promise of benefits made or implied by the government to any such prospective witness.

EXHIBIT "B"

MOTION FOR DISCOVERY AND INSPECTION

1. Results or reports of any physical or medical examination; and of any scientific test or experiment made in connection with this case, within the possession, custody or control of the government.

2. Copies of (i) all written or recorded statements, testimony, admissions or declarations of Mamone obtained by the government, or within its custody or control; and (ii) copies of reports, notes, summaries, memoranda and other documents based upon, derived from or containing such statements.

3. Copies of all documents obtained from third persons which are in the possession of the government and which the prosecution expects to utilize in proving the charges of the indictment.

4. Copies of (i) all recordings, transcripts, reports, logs, notes, conversations and memoranda of Mamone, the defendants and co-conspirators which were obtained directly or indirectly from wiretaps or other electronic surveillance; and (ii) all orders, petitions, affidavits, statements and other legal documents relating thereto.

5. Copies of all co-conspirators and co-defendants' statements made in the course of or in furtherance of the conspiracy in the possession or subject to the control of the government.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -x

THE UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

- -x

AFFIDAVIT IN SUPPORT OF PRE-TRIAL MOTIONS

73 Cr. 1099

Judge DUFFY

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Joseph P. Hoey, being duly sworn, deposes and says:

1. I am a member of the firm of Amen, Weisman & Butler, attorneys for defendant Angelo Mamone ("Mamone"). I submit this affidavit in support of Mamone's motion (i) to dismiss the first count of the indictment (the only count which relates to Mamone) on the ground that it is so vague and indefinite as to fail to adequately apprise Mamone of the charges against him; (ii) for a bill of particulars; (iii) for discovery and inspection; (iv) for a severance; (v) for production of favorable and exculpatory evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963); (vi) to strike the appellation "Butch" from the indictment as prejudicial surplusage; and (vii) for such other and further relief as the Court may deem appropriate.

THE INDICTMENT

2. The first count (and, as noted, the only count to which Mamone is a party) of the seventeen count, thirty-three party indictment herein, charges that from January 1, 1969, to the date of the filing of the indictment, in the Southern District of New York, defendants and other conspired to violate Sections 4705(a) and 7237(b) of Title 26, U.S.C., and Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, U.S.C., in that they would knowingly sell, barter and give away narcotic drugs not in pursuance of a written order issued by the Secretary of the Treasury and that they knowingly would distribute and possess with intent to distribute such narcotic drugs. The indictment sets forth twenty-five overt acts, consisting in the main of meetings, transfers of narcotic drugs and travels by co-defendants. Mamone himself is not mentioned in the body of the indictment or in the overt acts.

THE MOTION TO DISMISS

3. The authorities cited in our memorandum of law (Point I) show that the pleading of a conspiracy charge in absolutely conclusory language without the assertion of a single essential fact upon which the charge against Mamone

rest is a defect which requires that the indictment be dismissed. The conclusory language in which the indictment is couched is particularly prejudicial to Mamone for he is not mentioned anywhere in the body of the charge or in the overt acts. Mamone is simply told that he is one of thirty-three persons who allegedly conspired to violate the narcotics laws, and nothing more. It is respectfully submitted that such form of pleading is no more permissible than to charge that "defendant robbed a bank", or that "defendant submitted a false tax return." Both in the examples and in the indictment, the charge is so lacking in specificity and essential facts that a defendant is not adequately apprised of the nature of the charge he will be required to defend and is not adequately protected against twice being placed in jeopardy for the same offense. Accordingly, the indictment as to Mamone should be dismissed.

THE MOTION FOR A BILL OF PARTICULARS

4. In the event this Court rejects our contention that the indictment must be dismissed, we respectfully submit that the particulars we seek should be liberally granted. As noted, the indictment does not set forth a single ultimate

fact relating specifically to Mamone. In order to prepare his defense and avoid surprise upon the trial, he requests details relating to the nature of the conspiracy, acts committed in furtherance thereof and various details concerning pertinent dates, places and persons. Mamone needs such details to develop evidentiary leads crucial to his defense. The authorities cited in our accompanying memorandum (Point II) demonstrate that he is entitled to each of the particulars requested.

THE MOTION FOR DISCOVERY AND INSPECTION

5. Most of the materials requested by our motion for discovery and inspection, such as the results of tests and experiments conducted in connection with this case, defendant's own statements and testimony in the possession or control of the government and materials relating to electronic surveillance, are routinely given and do not require extensive discussion. Mamone also seeks notes, summaries and memoranda which may embody his statements. If the government has or acquires such materials it should be required to produce the same for the authorities we cite show that under Rule 16 a defendant is entitled to more than a verbatim return of his own words. He is also entitled to paraphrases, summaries and the like which incorporate his utterances.

Similarly, in this conspiracy prosecution it is essential that Mamone's motion for statements of his co-defendants and co-conspirators be granted for under settled principles of conspiracy law such statements may be admitted against him to the same extent as his own statements and admissions may be admissible against him. Indeed, it is probably more important to Mamone's defense to obtain statements of co-defendants and co-conspirators than to obtain his own statements because he can presumably apprise counsel of whatever he may have said. He is not likely to know and be able to defend against co-conspirators' statements which could be equally binding. It is respectfully submitted that the Second Circuit's oft repeated command that the discovery provisions of the Rules be liberally construed requires that statements of co-defendants and co-conspirators be produced for discovery pursuant to Rule 16 (see our Memorandum, Point III).

THE MOTION FOR
EXCULPATORY AND
FAVORABLE MATERIAL

6. It will not be disputed that Mamone is entitled to all favorable and exculpatory material in the possession or control of the government or which the government may subsequently acquire. However, such material should be furnished

to Mamone sufficiently early to enable him to make adequate use thereof in his trial preparation, formulating his theory of defense and developing evidentiary leads. It has been recognized that the utility of "Brady" material to the defense is substantially diminished if it is not produced sufficiently early. Indeed, the Second Circuit has held that tardy production of such material could constitute grounds for a new trial (see our Memorandum, Point IV). Accordingly, all exculpatory and favorable material should be provided the defense at an early date.

THE MOTION FOR A SEVERANCE

7. It would appear from the face of the indictment that even under the prosecution's theory, Mamone's connection with the crimes charged is peripheral. He is a party to only one of the seventeen counts of the indictment and as to that count the government does not allege any specific act which he performed. It merely sets forth his name and a series of thirty-two others as a conspirator. It is respectfully submitted that under the circumstances it would be unduly prejudicial to submit Mamone to a joint trial with the co-defendants, several of whom have been widely reported in the press as leading organized crime figures. Proof of the substantive counts of narcotics

trafficking upon a joint trial is likely to have an adverse effect upon the fairness of Mamone's trial on the conspiracy count and is likely to create highly prejudicial associations in the minds of the jurors which will make it difficult, if not impossible, for them to sort out the evidence relating to the specific acts and to the individual defendants in a manner consistent with a fair trial. In order to avoid the dragnet effect inherent in every mass conspiracy prosecution which can ensnare the innocent as well as the guilty (see our Memorandum, pps. 4-5), Mamone should be granted a separate trial unless the government comes forward with evidence demonstrating his connection with the events alleged in the first count of the indictment. In this respect, it should be repeated that other than a bare conclusory allegation that he conspired, the government does not point to a single act committed by Mamone.

Secondarily under this point, we request that the government be directed to produce for in camera inspection pursuant to Rule 14 any statement or admission which may have been made by co-defendants which the government intends to introduce into evidence and that the Court determine whether a severance is required under Bruton v. United States, 391 U.S. 123 (1968).

THE MOTION TO STRIKE
THE APPELLATION "BUTCH"
FROM THE INDICTMENT

8. Mamone is referred to as "Butch" in the caption and the single place in count one of the indictment where his name appears. We urge that such appellation be stricken as prejudicial surplusage pursuant to Rule 7(d) because the inclusion of such nickname could cause the jury to infer a prejudicial association between Mamone, racketeering and organized crime thus fatally tainting the objectivity of the trial, particularly in light of the fact that some co-defendants have been identified in the press as leading organized crime figures. The jury will be consciously or unconsciously aware of the fact that white collar defendants are seldom referred to by such colorful nicknames as are interspersed throughout this indictment. The Runyonesque nicknames gratuitously set forth beside Mamone's name and many of the co-defendants may add an element of color and flair to the indictment. However, they do nothing to clarify the indictment or further the proof of any element of the crimes charged. As our memorandum of law shows, the use of such nicknames has been condemned in the past and should be stricken here.

WHEREFORE, the relief requested in the order to show cause should be granted.

S/
JOSEPH P. HOEY

Sworn to before me this
26th day of October, 1973.

S/
Notary Public

AMEN, WEISMAN & BUTLER
17 EAST 63RD STREET, NEW YORK 10021

HERMAN L. WEISMAN
JOSEPH P. HOEY
MARTIN R. POLLNER
ROBERT D. WEISMAN
LESTER G. RENARD
ROBERT L. ELLIS
BARRY A. TESSLER

CABLE: AVOCATUS
(212) 838-2323

JOHN HARLAN AMEN (1926-1960)
WILLIAM J. BUTLER (1931-1957)

January 3, 1974

Hon. Kevin Duffy
United States District Judge
Southern District of New York
Foley Square
New York, New York 10007

Re: United States v. Tramunti, et al.
Indictment No. S 73 Cr. 931

Dear Judge Duffy:

Our ability to prepare for trial, already severely limited by the paucity of discovery and particulars afforded defendant Mamone, has been further impaired by the government's refusal to afford us timely access to certain electronic surveillance.

To briefly recapitulate, by letter dated December 10, 1973, we were advised that the government had one intercepted telephone conversation and several conversations between government witnesses and defendants which it would permit counsel to hear prior to trial. The government's letter set forth that counsel would be permitted to listen to the said items at 4:30 p.m. on December 20, 1973, at which time defense counsel would also be provided with copies of those transcripts of tape recordings which the government intended to use upon the trial.

At the December 20th meeting called by Mr. Phillips no tapes or transcripts were available. On that occasion Mr. Phillips indicated that the government did not intend to offer any tape or recording in evidence. However, he stated that if counsel desired to hear the tapes, which were stated to be about thirty hours in length, they would be available after the holidays.

On Wednesday, January 2nd, we contacted Mr. Phillips and were told first, that we would not have access to the original tapes, and second, that the only copies of said tapes had been given to another defense counsel for copying. We called the said counsel and were

advised that the copies furnished the government had been sent out for reproduction and because of their length would not be returned until the evening of Friday, January 4th. As a result, the tapes will not be available to us before the pretrial hearing on Monday, January 7th.

Our client, Angelo Mamone, is named in the first conspiracy count only. Originally he was not even referred to in an overt act, although the superseding indictment alleges that he was present at a single meeting at which the government's bill of particulars indicates the proceeds of a narcotics transaction were counted. The only details of the conspiracy charge heretofore given Mamone as a result of our omnibus pretrial motions were that Mamone allegedly entered the conspiracy in November, 1970, and that he was present at the aforesaid meeting when the proceeds of a narcotics transaction were being counted.

It is respectfully submitted that the vagueness of the indictment, which simply sets forth the conclusion that Mamone "conspired" and the scant information allowed on discovery, combined with our inability to hear the tapes sufficiently in advance of trial to make any use of the information which may be contained therein, does not constitute adequate notice of the charges against Mamone and renders it impossible for him to be ready for trial on January 4th.

Respectfully submitted,

AMEN, WEISMAN & BUTLER

By Robert L. Ellis

RLE:db

cc: Walter M. Phillips, Jr., Esq.
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -x

UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

- -x

NOTICE OF MOTIONS PURSUANT TO RULES 29(c) and 33, FEDERAL RULES OF CRIMINAL PROCEDURE

73 Cr. 1099
Judge DUFFY

S I R :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Robert L. Ellis, sworn to April 1, 1974, the indictment and all prior proceedings had herein, the undersigned will move before this Court on behalf of defendant Angelo Mamone, on April 5, 1974, at a time and place to be fixed by the Court, for judgment of acquittal notwithstanding the verdict or, in the alternative, for a new trial pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure, and for such other and further relief as the Court deems appropriate.

April 1, 1974.

Yours, etc.,
AMEN, WEISMAN & BUTLER

By_____
A Member of the Firm
Attorneys for Defendant
Angelo Mamone
17 East 63rd Street
New York, New York 10021
838-2323

TO: PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America
United States Courthouse
Foley Square
New York, New York 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -x

UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

- -x

73 Cr. 1099

AFFIDAVIT IN SUPPORT OF DEFENDANT MAMONE'S MOTIO PURSUANT TO RULES 29(c) and 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ROBERT L. ELLIS, being duly sworn, deposes and says:

1. I am a member of the firm of Amen, Weisman & Butler, attorneys for the defendant Angelo Mamone ("Mamone"). I am familiar with the pertinent facts and submit this affidavit in support of Mamone's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure.

MAMONE'S CONTENTIONS

2. As the Court is aware, having presided during the long weeks of trial and having undertaken the Herculean task of marshalling the evidence, Mamone's involvement in

the far-reaching conspiracy described by the government witnesses under any conceivable view of the evidence was peripheral at best. As we have said often during the course of the trial, there is no evidence that he ever bought or sold narcotics; that he ever possessed, cut or stored narcotics or that he ever participated in any manner in a narcotics transaction. Indeed, the evidence does not even show that he was present on any occasion that a narcotics transaction was discussed. Of course, we recognize that under the authorities not every member of a conspiracy must personally deal in narcotics. What is required is probative, reliable evidence that each defendant must knowingly adopt the venture, make it his own and have a stake in the outcome. It is respectfully submitted that the record is devoid of any such evidence to establish Mamone's guilt of the narcotics conspiracy involved here.

3. We therefore contend in the first instance that the evidence failed to establish that Mamone was a knowing and willing participant in the conspiracy. We will argue that, viewed in a light most favorable to the government, the proof showed no more than association with some of the conspirators and, with respect to events such as the money

counting incident at the Beach Rose Social Club and other acts attributed to Mamone, perhaps casual and insignificant facilitation of the purposes of the conspiracy. The authorities cited in our memorandum of law submitted herewith demonstrate that such evidence is insufficient to sustain guilt of conspiracy to violate the narcotics laws.

4. In the event this Court holds that the evidence against Mamone was sufficient to sustain the verdict, we urge in the alternative that the cumulative effect of various errors deprived Mamone of a fair trial. Among these are the totally inadequate pretrial disclosure allowed Mamone which denied him notice of the principal allegations against him until the government's opening statement to the jury and thus deprived him of a meaningful opportunity to prepare for trial. In addition, the Court's marshalling of the evidence failed to present a balanced picture of the case relating to Mamone. Specifically, we refer to the Court's statement that Mamone's defense rested on the presumption of innocence and his move to Florida in May, 1973, without advising the jury (i) that Frank Stasi testified that the Beach Rose Social Club was frequented by neighborhood persons who went there to gamble and that Mamone was one such person, and (ii) that John Barnaba, the government's principal

witness against Mamone, testified that he had no knowledge of Mamone's alleged involvement in narcotics. The Court correctly charged that testimony elicited on cross-examination was evidence just as that rendered on direct examination. Mamone's principal defense was the evidence of the absence of his involvement elicited on cross-examination. The failure to refer to this evidence to negate the inference of guilt while referring at length to the prosecution's evidence was grossly prejudicial to Mamone, which under the circumstances of this lengthy and complex trial was not offset by the Court's charge that the jury's recollection of the evidence was controlling.

5. When the foregoing is considered with the admission of the million dollars, which we contend was without foundation, the government's summation, which we submit was replete with impropriety, the jury's consideration of the evidence against Mamone may very well have been improperly influenced toward a verdict of guilt.

THE EVIDENCE RELATING TO MAMONE

6. As noted, it is our principal contention that the evidence against Mamone, viewed in a light most favorable to the government, at best permits the inference that Mamone associated with some of the co-conspirators and perhaps lent casual and insignificant assistance to their venture. To demonstrate that there is no basis in the record for the conclusion beyond a reasonable doubt that Mamone knowingly, with criminal intent, became a member of the venture, adopted it as his own or had a stake in its outcome, we will discuss the evidence relating to Mamone in its entirety.

A. The Evidence of Association

7. Frank Stasi, the steward at the Beach Rose Social Club, identified Mamone and testified that he saw him at the club three or four times a week (379, 381).*

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* Numerals in parentheses refer to pages of the stenographers' minutes unless otherwise denominated.

Although Stasi saw Mamone speak to Inglese and on one occasion delivered a message from Inglese to Mamone that Inglese wanted to see him, Stasi did not hear what Mamone and Inglese spoke about nor did he know why Inglese wanted to see Mamone (382). Stasi did not claim that Mamone was ever present when narcotics were dealt or even discussed nor did he suggest that Mamone dealt in narcotics himself.

8. On cross-examination, Stasi testified that as club steward it was his job to prepare food and drinks for the card players and to keep score at the games which went on "each and every day" from early afternoon until late morning (718-19). The card games at the Beach Rose Social Club were attended by a great number of people from the neighborhood and Mamone was one of those who went to the club to play cards (719-719[a]). According to Stasi, Mamone was a gambler who regularly played at the Beach Rose Social Club and other places, including Las Vegas (720).

9. Stasi further testified that when he and Inglese arranged mixing sessions at the club they did so surreptitiously to assure that the card players and other persons present could not overhear what was being arranged (721-22).

10. It is respectfully submitted that Stasi's testimony and the photographic exhibits (17, 20, 20a-e, 53) show no more than that Mamone was present at the club, as were numerous other neighborhood people, to gamble.

11. In the course of his summation, the United States Attorney argued that defense witness Genevieve Patalano (actually a government witness) and Joseph Di-Benedetto testified to the close association between Mamone and Joseph DiNapoli (5060). In this respect, Mr. Curran was mistaken. Mrs. Patalano merely said that she knew Mamone long before she knew DiNapoli from a restaurant owned by Mamone's in-laws (3267-8, 3273-5). She did not say that she ever saw Mamone and DiNapoli in each other's presence nor did she give any evidence of "an association" between the two.

12. Similarly, Joseph DiBennedetto, a bartender and a loan sharking associate of DiNapoli's, testified that he saw both DiNapoli and Mamone at the Cottage Inn, a public bar of which he was a part owner. DiBenedetto did not say however that he saw Mamone and DiNapoli in the bar together or that Mamone knew DiNapoli.

13. It is submitted that the testimony of Mrs. Patalano and DiBennedetto merely shows that Mamone and DiNapoli had common friends or acquaintances. It hardly follows that persons known to the same third persons are necessarily known to or associated with each other, let alone that they are engaged in a narcotics conspiracy with each other as suggested by the government.

B. The Evidence of Casual Facilitation

14. The principal witness against Mamone was John Barnaba whose testimony must be viewed in light of his admission that he never bought narcotics from Mamone nor did he ever sell narcotics to Mamone (1639). Neither Barnaba nor any other government witness testified that to his knowledge (personal or otherwise) Mamone ever possessed a narcotic drug or engaged in a narcotics transaction (1639-40).

15. The sum total of Barnaba's testimony against Mamone was that:

a) In November, 1970, he, Barnaba, delivered $5,500 allegedly the proceeds of a narcotics transaction, to Inglese at the club. Inglese called Mamone over to help count the money and Mamone did so (1360). There was no discussion of narcotics on this occasion nor is there any

evidence that Mamone knew or had reason to believe that the money represented the proceeds of a narcotics transaction. Significantly, in his summation the United States Attorney conceded that evidence concerning this counting incident was insufficient to place Mamone in a narcotics conspiracy (5061).

b) Barnaba further testified that Mamone "vouched" for the reliability of one Richard Forbrick. This incident allegedly occurred when Forbrick was expressing concern over a sum of money he wanted refunded from Inglese (1367). Barnaba agreed to try to get Forbrick's money back. Inglese was allegedly reluctant to see Forbrick until Mamone, obviously in an offhand manner, said that Forbrick "was all right, he said he knew his wife, there was nothing wrong with him" (1368).

Assuming, arguendo, that this testimony could be credited by the jury in light of Barnaba's admission on cross-examination that Forbrick did not know Mamone and Mamone did not know Forbrick (1614), it is nevertheless submitted that under the authorities cited in our memorandum of law, it is insufficient to establish anything more than that Mamone rendered casual and insignificant facilitation to Barnaba and Inglese without establishing that he possessed the

requisite criminal intent to become a member of the conspiracy. In this respect, it is noteworthy that Barnaba and Inglese only discussed money in Mamone's presence. The record does not disclose that there was any mention of narcotics.

c) Similarly, the so-called Burke incident in which Mamone allegedly intervened to protect Barnaba from one Burke (see pp. 1421-7), at best constitutes casual and insignificant furtherance of a peripheral aspect of the conspiracy. It will be recalled that Barnaba's difficulty with Burke arose in May, 1971; that in July or August of that year, after repeated attempts by Barnaba to obtain Inglese's assistance, Mamone overheard a discussion concerning Burke between Barnaba and Inglese and volunteered that he knew Burke; that Burke owed him a substantial sum of money and that he, Mamone, would and did forgive a portion of Burke's indebtedness to him in return for peace for Barnaba.

It is respectfully submitted that Mamone's self-interjection into the Barnaba-Burke controversy cannot be deemed to have enlisted him in the narcotics venture. Any narcotics dealing between Barnaba and Burke had long since come to an end. Mamone derived no benefit or gain from his intercession. Indeed, the record does not show

that Mamone was aware that the controversy involved anything other than money, for here again nothing was said about narcotics in the conversation which Barnaba claimed that Mamone overheard (1426-7).

d) Admittedly, Barnaba testified that Mamone said that Burke was "his customer" (1427). However, there is nothing other than this vague, belated allusion, the word "customer" having been mentioned in Court for the first time, to even remotely suggest that Mamone and Burke dealt in narcotics. Certainly there is no evidence to establish that Burke and Mamone engaged in narcotics transactions during the period covered by this indictment or within the applicable period of limitations. Absent some evidence that Burke and Mamone engaged in narcotics transactions during the relevant period, Barnaba's recollection that Mamone used the word "customer" should not suffice to place Mamone in this conspiracy.

e) The only other substantive reference in the record to Mamone is Barnaba's hearsay testimony that in December, 1971, he was told by one Patty DiLascio, that he, DiLascio, after an unsuccessful attempt to obtain narcotics from DiNapoli "was trying to see his partner" Mamone (1461).

There is no evidence that DiLascio ever attempted to or did see Mamone or that Mamone was actually DiNapoli's partner. Indeed, Barnaba admitted on cross-examination that he did not know whether Mamone was DiNapoli's partner or even whether DiNapoli had a partner (1640).

16. It is respectfully submitted that the hearsay testimony of Barnaba regarding the DiNapoli-Mamone partnership, the evidence of the money counting incident which the government concedes to be insufficient, the alleged vouching for Richard Forbrick and the Burke incident are far too slender reeds upon which to predicate a finding that Mamone, with criminal intent, knowingly joined a narcotics venture. However, this evidence, and some ethereal testimony concerning association is all there is in the record. While the incidents involving Mamone may appear to acquire a certain weight by their number, they are insufficient to support the inference that Mamone did more than frequent the Beach Rose Social Club and from time to time chimed into the discussions going on there. Thus, we submit that judgment of acquittal should be entered, notwithstanding the jury's verdict. If, however, the Court disagrees, we argue in the alternative that a new trial is required because the indisputably close question of Mamone's criminal liability may have been tipped toward a verdict of guilty by a series of errors which we will separately discuss.

THE LACK OF ADEQUATE PRETRIAL DISCOVERY

17. Mamone was prevented from adequately preparing for trial by the totally inadequate pretrial disclosure afforded him. The initial indictment which was filed on or about October 5, 1973, merely alleged that Mamone was a member of the conspiracy charged in the first count. He was not mentioned in any overt act or substantive count. There was nothing in this first indictment to apprise Mamone of the nature and extent of his alleged involvement other than the conclusion that he was a member of a conspiracy. Accordingly, on or about October 29, 1973, Mamone filed comprehensive pretrial motions for discovery and particulars in an attempt to elicit details about the actual and specific charges against him.

18. It is hardly disputable that further information beyond the bare allegation of conspiracy was needed to enable Mamone to prepare his defense and to avoid surprise upon the trial. Yet repeated efforts by counsel to obtain such further information were unsuccessful.

19. Early in December, 1973, a superseding indictment was filed. The only new information contained therein concerning Mamone was that "In or about November, 1970, defendant Angelo Mamone went to the Beach Rose Social Club" (Overt Act 5).

20. Pursuant to direction of the Court, deponent attempted to negotiate our discovery motion with the government. A bill of particulars received by this office added only that Mamone's aforesaid visit to the Beach Rose Social Club was to assist Inglese in counting the proceeds of a narcotics transaction. A supplemental bill of particulars added no information with respect to the specific case against Mamone.

21. Throughout the pretrial suppression hearing and the early days of the trial, deponent's repeated efforts to obtain further particulars were denied. (See order of this Court dated January 1, 1974.) Indeed, it was not until we received a letter dated January 24, 1974, that we were even told that the persons present at the money counting incident were Barnaba, Inglese and Mamone.*

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* In addition to our formal and informal efforts to obtain discovery and particulars, we attended the pretrial suppression hearing in its entirety and listened to all of the tapes made available by the government in an effort to learn something about the case against Mamone. This effort proved fruitless. Mamone was not mentioned either in the tapes provided us or upon the suppression hearing.

22. When this trial began the only information we had obtained concerning Mamone's alleged participation in the conspiracy was the partial data concerning the money counting incident. Referring to this incident, Mr. Curran asked in summation (5060-61):

> "Does this put Mamone in a narcotics conspiracy?
>
> "Absolutely not. Does the government argue that it puts him in a conspiracy? Absolutely not.
>
> "Is that the only evidence standing alone against Mamone? Would that make him part of the conspiracy? Not standing alone."

23. Thus, depsite our repeated efforts to obtain further information, the only disclosure we received prior to trial about the case against Mamone concerned an incident the government concedes was not sufficient to place Mamone in the conspiracy.

24. It is respectfully submitted that the discovery afforded Mamone falls far short of the Second Circuit's command that discovery be liberally granted and granted sufficiently in advance of trial to enable a defendant to develop his theory of defense and all evidentiary leads which can be developed therefrom.

25. Here, it was not until after the start of trial that Mamone learned that the government's case actually consisted of the Burke incident, the Forbrick vouching incident and the alleged DiNapoli-Mamone partnership. Certainly the government could not have been prejudiced by earlier disclosure, particularly since its witnesses were sequestered. However, the failure to apprise Mamone of the details of the charge against him resulted in substantial prejudice for Mamone was deprived of an opportunity to prepare to meet those charges.

26. We have since ascertained that Burke was killed in a domestic quarrel in August, 1972. If we knew in advance of trial that there was a Burke incident in the government's case we could have investigated Burke's whereabouts and activities in August, 1971, when he supposedly met with Mamone.

27. We have since ascertained that Forbrick is totally disabled as a result of a stroke. If we were advised in advance of trial that the government contended that Mamone vouched for Forbrick we could have investigated Forbrick's physical ability to meet with Inglese after Mamone allegedly cleared the way for him to do so.

28. So, too, the alleged DiLascio-DiNapoli partnership could not be investigated because Mamone did not learn of the government's contention until he was actually on trial.

29. It is respectfully submitted that Mamone was substantially prejudiced by the lack of pretrial disclosure in that he was impeded from presenting a defense to the true issues raised by the government upon trial. Instead, he was limited to a general denial of his guilt - a general denial that proved woefully inadequate despite the paucity of evidence that he was a knowing part of this narcotics venture.

THE MILLION DOLLARS

30. I am advised that attorneys for defendant Joseph DiNapoli will argue at length that the million dollars seized from DiNapoli and Vincent Papa on the night of February 3, 1972, was improperly received as evidence herein. For the sake of brevity, we will not attempt to duplicate those arguments. Suffice it to say here that Mamone contends that there was no showing whatever that the million dollars was the fruit of this conspiracy or that it had any other relevance to this case. Indeed, the evidence negates the inference that DiNapoli derived sums of such magnitude from the narcotics activities attributed to him since only a single

sale of approximately $22,000 was established. The receipt of the million dollars tainted the entire proceeding. But beyond its general effect it had a particularly prejudicial impact on Mamone who the government argued - entirely on the basis of hearsay evidence - was DiNapoli's partner and thus presumably an owner of a share of the million dollars.

THE GOVERNMENT'S SUMMATION

31. The handicap under which Mamone was forced to defend himself by reason of the inadequate pretrial disclosure afforded him and the introduction of the million dollars was exacerbated by repeated improprieties in the United States Attorney's summation. The Court of Appeals in recent months has condemned similar summations by various assistant United States Attorneys on numeros occasions. The prejudicial effect of placing the prestige and credibility of the United States government, the misstatement of the proof and the invocation of the Court's credibility is magnified when committed by the United States Attorney himself, with all of the majesty his office carries in the mind of a lay jury, rather than by one of his assistants.

32. In his summation, Mr. Curran repeatedly disparaged the credibility of the defense attorneys far beyond the bounds of fair comment while invoking the credibility of his office, the government of the United States and the Court in support of the prosecution witnesses. For example, he said of the defense that:

> "The standard tactic that has been employed...is to divert your attention from the issues in the case." (5030)

And referring to defense arguments, Mr. Curran noted that:

> "they certainly didn't attempt to confuse you with the facts." (5140)

As against the "diversionary tactics" of the defense, Mr. Curran invited the jury (5031):

> "to try us, the government. In fact, we urge you to try us. Try us with a careful review of all the facts that are before you; before you in evidence on the record, in pictures, in documents, on tapes. When you do this we submit you will find that the government and its witnesses have been entirely candid and truthful." (Emphasis added.)

Manifestly, it was not the government who the jury was required to try nor were the government witnesses part of a government team to be jointly evaluated by the jury.

33. On numerous occasions Mr. Curran suggested that the defense was arguing that his office connived with government witnesses to fabricate testimony and invited the jury to acquit the defendants if they believed his office guilty of the charge (see, e.g., 5038, 5042, 5139).

34. It is respectfully submitted that there was no justification whatever for Mr. Curran's attack on Mamone's defense which was primarily that, even if the government witnesses were believed, he could not be convicted, the insertion of the credibility of his office into this case or the joinder of the government as a party to be tried along with its witnesses. Certainly there was nothing in Mamone's summation to raise an issue as to the credibility of the government.

35. However, not content with laying the credibility of his office on the line, Mr. Curran equated the issue of the credibility of his witnesses with the Court's willingness to reward perjury (5049, 5056). It hardly requires extensive argument to establish the impropriety of the United States Attorney suggesting that the jury must find that the Court would knowingly countenance "lying to convict innocent people" before it could reject the testimony of the government witnesses.

36. In an obvious attempt to create an atmosphere of criminality and an aura of violence in the courtroom Mr. Curran urged the jury to:

> "think abou this, please, ladies and gentlemen - identified Vincent DiNapoli sitting right here in this courtroom during his testimony. DiNapoli was sitting as a spectator in the second row right here staring at Stasi while Stasi testified. What does your common sense tell you about that?" (At p. 5094.)

It is respectfully submitted that it is reprehensible for the United States Attorney to have implied that the presence of the brother of a defendant in the courtroom as a "matter of common sense" was evidence of an attempt to coerce a government witness. Standing alone, this incident justifies the grant of a new trial.

37. But the Vincent DiNapoli incident by no means stands alone. In a dramatic peroration Mr. Curran branded defense counsel as "advocates obligated to argue" for their clients - clients who he had argued for hours were reprehensible criminals and then, as distinguished from the defense attorneys and their clients:

"Well, ladies and gentlemen, as the United States Attorney for this district I have a great obligation too and esteem for my client. My client is the United States. I want to leave you with the knowledge that that obligation is one to which I am firmly committed.

"Ladies and gentlemen, we have an obligation to justice. That is my obligation, it is Mr. Phillips', Mr. Fortuin's, Mr. Engel's, in this case and in every case." (5140)

38. The prejudicial impact of the foregoing infirmities in the government's summation were amplified by repeated misstatements of the evidence.

39. For example, Mr. Curran told the jury that they know:

"from the testimony of John Barnaba that the defendant DiNapoli and the defendant Mamone were joined together in...a narcotics partnership..." (5059)

40. It is manifestly unfair to have so argued without telling the jury that Barnaba admitted that he did now know whether DiNapoli and Mamone were partners or whether DiNapoli even had a partner (see R. 1640).

41. Furthermore, it was improper for Mr. Curran to have argued (at p. 5060) that "we also know from the testimony of John Barnaba and Frank Stasi that the defendant Mamone was active...in the narcotics business which defendants Inglese, Joe Crow, etc..." operated since neither Barnaba nor Stasi testified that Mamone was active in a narcotics business. It will be recalled that Stasi did no more than say that Mamone came to the club to gamble and on occasion spoke to Inglese while Barnaba disclaimed knowledge of any specific Mamone connection with narcotics activities.

42. In what is perhaps the most serious lapse directly involving Mamone, Mr. Curran in recounting the Burke incident:

> "So Burke went looking for Barnaba and Barnaba got concerned. Barnaba went to Inglese. It's all in the record. He said, 'About the stuff you gave me, the fellow Burke says it's no good, he's looking for me.'
>
> "Inglese told him, 'Don't be concerned about it.'
>
> "Again, the defendant Mamone heard -- overheard, heard -- he was there, in the record, involved in this conversation -- and I quote from the record, it is at pages 1427 and 1428, Mamone said that, 'The guy was a customer of his, he knew him and that he owed him twenty-five or thirty thousand dollars."

The version of the Burke incident which Mr. Curran presented to the jury suggested that Barnaba went to Inglese when he learned that Burke was looking for him; that he told Inglese that Burke was complaining about the quality of the narcotics sold to him; that Mamone was present at that first post-Burke Barnaba-Inglese meeting; overheard the conversation including Burke's complaint about defective drugs and offered his assistance.

43. This is a gross distortion of the actual testimony which, as has been noted, was that Barnaba and Inglese held the conversation referred to by Mr. Curran in May, 1971, when the sale to Burke took place and that it was not until months later, after numerous visits by Barnaba to Inglese, in July or August, that Mamone finally learned that Burke was after Barnaba. Moreover, contrary to Mr. Curran's argument, the record does not disclose that narcotics were mentioned during the course of the conversation overheard by Mamone (1428, 1662-65).

44. In a further departure from propriety Mr. Curran argued that Barnaba's testimony was corroborated by the seizure of narcotics from defendant Springer (5066). It will be recalled that this narcotics was admitted

against Springer only as to the substantive count and was not to be used with respect to the conspiracy.

45. In a similar instance the Court ruled that the government could not introduce expert testimony of a relationship between narcotics and loan sharking. Yet, in referring to the million dollars, Mr. Curran argued (5105):

> "Joseph DiNapoli earned it by selling narcotics. Loan sharking and narcotics go hand in glove."

46. As our memorandum of law demonstrates, lesser departures in summation than those involved here have resulted in new trials under recent Second Circuit decisions. Certainly, where the evidence is as close as it is against defendant Mamone, a new trial should follow.

THE MARSHALLING OF THE EVIDENCE

47. It is undoubtedly an understatement to point out that the Court's marshalling of the prosecution evidence was as comprehensive as human effort could make it. Certainly each and every item of the prosecution evidence relating to Mamone was recalled for the benefit of the jury. Yet when it came to Mamone's contentions, the Court merely charged:

> "Defendant Mamone also relies upon the presumption of innocence and claims that the witnesses against him did not give credible evidence.
>
> "Defendant Mamone introduced business records which showed that he moved his household goods to Florida on May 25, 1973. He asks how could he be included in this alleged on-going conspiracy taking place in the Bronx when he had moved to Miami. In effect, he contends that his move shows that he was no part of the alleged conspiracy." (5322)

48. Deponent subsequently excepted to the marshalling with respect to Mamone, pointing out that the Court completely omitted mention of defense contentions established upon cross-examination (5335-6). Specifically, it was urged that the cornerstone of Mamone's defense was the absence of specific evidence of narcotics involvement as acknowledged by Barnaba and Stasi's testimony on cross-examination that Mamone was a gambler who, as many neighborhood people, went to the Beach Rose Social Club to gamble (id.). We further requested the Court to dispel the impression that anyone at the club was necessarily aware of the narcotics activities therein by mentioning Stasi's admission that the arrangements for cutting sessions were surreptitious, precisely for the purpose of not allowing outsiders present at the club to learn thereof (id. and see also, pp. 5346-7).

49. Thus, by reciting all of the prosecution evidence against Mamone and completely omitting mention of critical points developed on cross-examination by Mamone, the Court not only downgraded evidence elicited on cross-examination, assuming that the jury could recall such evidence without marshalling, it also suggested that Mamone's principal reliance was on the presumption of innocence and the move to Florida when, in fact, Mamone principally relied upon admissions derived from cross-examination that he was a gambler who Barnaba did not know to have been involved in narcotics.

CONCLUSION

50. In addition to the foregoing, Mamone adopts all arguments asserted on behalf of co-defendants.

51. We submit that defendant Mamone is entitled to judgment of acquittal notwithstanding the verdict because the jury could not properly conclude beyond a reasonable doubt upon the present record that he was a participant in a narcotics conspiracy. In any event, he is entitled to a new trial because the errors mentioned above - the inadequate pretrial disclosure, the receipt of the million dollars, the improper government summation and the Court's failure to marshall Mamone's most significant

defense evidence, the cross-examination admissions of Stasi and Barnaba, as well as other errors such as the receipt of substantial hearsay against Mamone without a proper independent showing that he was in fact a member of the conspiracy deprived him of a fair trial.

WHEREFORE, the within motion should be granted in all respects.

S/
ROBERT L. ELLIS

Sworn to before me this
1st day of April, 1974.

S/
Notary Public